

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

2022/CCZ/0018

IN THE MATTER OF: **ARTICLES 72(4) OF THE CONSTITUTION
OF ZAMBIA CHAPTER 1 OF THE LAWS OF
ZAMBIA**

IN THE MATTER OF: **THE ELECTORAL PROCESS ACT NUMBER
35 OF 2016**

AND

IN THE MATTER OF: **THE DECISION OF THE ELECTORAL
COMMISSION OF ZAMBIA DATED 24TH
AUGUST, 2022**

BETWEEN:

**JOSEPH MALANJI
BOWMAN CHILOSHI LUSAMBO**



AND

THE ATTORNEY GENERAL

ELECTORAL COMMISSION OF ZAMBIA

Coram: **Mulonda, Mulenga, Chisunka and Mulongoti 6th September,
2022, 7th September, 2022 and 10th March, 2023**

For the Applicants: *Mr. T. S. Ngulube and Mr. F. Chipompela of Messrs
Tutwa S. Ngulube and Co,
Mr. M. Zulu and Mr. J.imba of Makebi Zulu
Advocates
Mr. J. Chirwa of Messrs Ferd Jere & Co.*

For the 1st Respondent: *Mr. M. Kabesha, SC -Attorney General,
Mr. M. Muchende, SC - Solicitor General,
Mr. J. Simachela - Chief State Advocate,

Ms. L. S. Chibowa - Principal State Advocate and
Mr. M. S. Mwiya - Ass. Snr State Advocate*

For the 2nd Respondent: *Ms. T. Phiri - In House Counsel, Electoral Commission of Zambia*
Mr. M. Bwalya - In House Counsel Electoral Commission of Zambia

JUDGMENT

Mulonda JC, delivered the Judgment of the Court.

Cases Referred to:

1. **Zambia National Commercial Bank Plc v Musonda and 58 Others CCZ Selected Judgment No. 24 of 2018**
2. **Steven Katuka and Law Association of Zambia v Attorney General and Ngosa Simbyakula and 63 Others CCZ Selected Judgment No. 29 of 2016**
3. **Law Association of Zambia and Chapter One Foundation v Attorney General 2019/CCZ/0013, 2019/CCZ/0014**
4. **Law Association of Zambia v Attorney General 2022/CCZ/0051**
5. **Joseph Malanji v Charles Abel Mulenga and Electoral Commission of Zambia 2021/CCZ/A0021**
6. **Bowman Lusambo v Bernard Kanengo and Electoral Commission of Zambia 2021/CCZ/A0019**
7. **Chishimba Kambwili v Attorney General 2021/CCZ/009**
8. **Fred M'membe and Post Newspaper (in Liquidation) v Mbozi and Others SCZ Appeal No. 7 of 2021**
9. **Bowling Works v ED Works 1843 4 ET at 416**
10. **Scott v Scott SCZ No. 122 of 2004**
11. **Jonas Zimba v Attorney General 2022/CCZ/007**
12. **Newplast Industries v Commissioner of Lands and Another (2001) Z.R. 51**
13. **Chikuta v Chipata Rural Council (1974) Z.R. 241**
14. **Vincent Lilanda and 2 Others v Attorney General 2020/CCZ/004**
15. **Kabisa Ngwira v National Pension Scheme Authority 2019/CCZ/17**
16. **JCN Holdings Limited v Development Bank of Zambia SCZ Appeal No. 87 of 2012**
17. **Charles Mukanda v Attorney General 2021/CCZ/0019**
18. **Isaac Mwanza v the Attorney General 2021/CCZ/0045**

- 19. Charlotte Scott v Margaret Mwanakatwe and Electoral Commission of Zambia CCZ Selected Judgment No.50 of 2018**
- 20. Munir Zulu v Gertrude Pilila Mwanza 2021/CCZ/029**
- 21. Shamwana and 7 Others v The People (1985) Z.R. 41 (S.C.)**
- 22. Bizwayo Nkunika v Lawrence Nyirenda and the Electoral Commissions of Zambia 2019/CCZ/005**

Legislation Referred to:

- 1. The Constitution of Zambia (Amendment) Act No. 2 of 2016**
- 2. The Electoral Process Act No. 35 of 2016**
- 3. The Constitution of Zambia, 1996**

Other Works Referred to:

- 1. The Report of the Constitution Review Commission 2005**
- 2. Final Report of the Technical Committee on Drafting the Zambian Constitution 2013**

INTRODUCTION

- [1] When we delivered the Court's judgment in this matter on 7th September, 2022 we placed on record the fact that our decision of that day was in form of an abridged judgment. We now render the full judgment in this matter.
- [2] This is a Judgment on the applicants' originating summons where they sought the determination of questions of law and interpretation of the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution). The questions for determination are four in number and are as follows:

1. **Whether the decision of the Electoral Commission of Zambia dated the 24th August 2022 is illegal, null and void;**
2. **Whether the Applicants are eligible to contest the 15th September, 2022 by-elections;**
3. **Whether fresh nominations should be conducted to allow the Applicants participate in the by-elections.**
4. **What is meant by causing a vacancy in the National Assembly as stated in Article 72 of the Constitution.**

APPLICANTS' CASE

- [3] The originating summons was accompanied by an affidavit in support deposed to by the 1st applicant. The 1st applicant averred that he was a Member of Parliament for Kwacha Constituency until his seat was nullified by this Court through a judgment on appeal from a decision of the High Court.
- [4] It was stated that by a media statement dated 24th August, 2022 the 2nd Respondent issued a communique to aspiring nominees in the by-election slated for 15th September, 2022 that it would not accept nominations from candidates who caused a vacancy in the National Assembly. That the 2nd respondent cited Article 72(4) of the Constitution and had thereby illegally and unconstitutionally interpreted provisions of the Constitution by stating in its media statement that it would not entertain the applicants' participation in the nomination and that the

applicants were not eligible for nomination to participate in the scheduled by-elections.

[5] It was further stated that an authority or body like the 2nd respondent created under the Constitution could only exercise powers bestowed on it by the Constitution. That although the media statement issued by the 2nd respondent did not mention the applicants by name, they are the ones that lost their seats through nullifications and as such the statement referred to them.

[6] It was averred that the media statement was an attempt to prevent the applicants from contesting as candidates in the by-election and to create a disqualification that is neither legal nor constitutional. The 1st applicant stated that the 2nd respondent had exceeded their constitutional mandate and jurisdiction by interpreting the provisions of Article 72(4) of the Constitution. He further contended that the 2nd respondent has no mandate to interpret the Constitution and that it cannot, on its own, disqualify a candidate who lost a seat through an election petition.

- [7] According to the 1st applicant, the decision by the 2nd respondent is illegal *ab initio* and must be set aside as the Constitution is clear as to the mandate of the 2nd respondent which does not include barring candidates that have lost their seats through nullification. That this Court did not disqualify the applicants from contesting as candidates and therefore the 2nd respondent abused its authority in the conduct of nominations by creating illegal conditions upon which nominations were anchored.
- [8] It was contended that unless the power to interpret the Constitution is expressly given to the 2nd respondent, it has no jurisdiction to interpret the law or disqualify a candidate who has lost a seat in an election petition. That this Court has jurisdiction to determine this matter as it is the only institution mandated by the Constitution to either disqualify a candidate at the time of nullification of a Parliamentary seat or to interpret the provisions of the Constitution.
- [9] The applicants in their skeleton arguments referred us to the case of **Zambia National Commercial Bank Plc v Musonda and Others**¹ and submitted that the provisions of the Constitution should not to be read in isolation as the 2nd respondent had done

by simply isolating Article 72(4) of the Constitution as the reason for rejecting the applicants' nominations without considering Article 52 of the Constitution.

- [10] It was further submitted that in the case of **Steven Katuka and Law Association of Zambia v Attorney General and Ngosa Simbyakula and 63 Others**² it was held that the starting point of any interpretation is the literal or ordinary meaning of words or articles that touch on the interpretation.
- [11] The applicants argued that the conduct of the 2nd respondent offends the national values and principles enshrined in the Constitution and tends to shrink democracy and good governance in the country. It was the applicants' submission that the conduct of the 2nd respondent is not only discriminatory against the applicants but also against democracy and good governance. That the electorate should be free to choose their own candidates and no authority should exclude any participants from taking part in elections.
- [12] The applicants also made submissions regarding the alleged contravention of the Constitution which we will not consider on the merits for reason we will state later in the Judgment.

[13] On the question of the interpretation of statutes, it was submitted that the Court is not concerned with what the Legislature meant to say or what their intentions were but the Court is concerned with the expressed intention of the Legislature. That when the language is plain and there is nothing to suggest that any words are used in a technical sense or that the context requires a departure from the fundamental rule, there would be no reason to depart from the literal meaning. The applicants referred us to our decision in **Law Association of Zambia and Chapter One Foundation v Attorney General**³ on interpretation of the Constitution to further support their argument.

[14] The applicants submitted that this Court in the case of **Law Association of Zambia v Attorney General**⁴ had occasion to interpret Articles 72(2)(h) and 73(4) where we distinguished the difference between 'nullify' and 'disqualify'. It was submitted that the use of the word 'disqualified' by the 2nd respondent was meant as a punishment where upon nullification of the seat no punishment was pronounced. That perusal of the judgment of this court in **Joseph Malanji v Charles Abel Mulenga and**

Electoral Commission of Zambia⁵ reveals that this Court nullified the seat in its judgment on 3rd August, 2022 and no more action was pronounced after that. That this was also the case in **Bowman Lusambo v Bernard Kanengo and Electoral Commission of Zambia**⁶ whose election was nullified by this Court on 28th July, 2022.

- [15] It was further submitted that upon lodging the nomination documents, the returning officer stated that all other documents were in order but for the provision of Article 72(4) which disqualifies the applicants. That this was illegal because while Article 52(4) empowers the returning officer to reject the nomination papers of a candidate after presentation of the same, using Article 72(4) does not create similar powers. It was argued that the 2nd respondent acted *ultra vires* the Constitution.
- [16] With regard to the argument on mode of commencement, it was submitted that notwithstanding any error in procedure, this Court is empowered to do substantial justice in the matter and nothing should stop this Court from defending not only the Constitution but also the sanctity and credibility of the Court. It was further submitted that Article 128(1) of the Constitution is

couched in discretionary terms as it uses the term “may petition” and not “shall petition”. It was the applicants’ submission that this Court should hear and determine this matter on its merits as this is not an ordinary civil matter but a Constitutional matter and one of national importance.

- [17] It was further submitted that this Court should not allow institutions of governance to take over the inherent jurisdiction and delicate role of the Judiciary. The applicants referred us to the cases of **Law Association of Zambia v Attorney General**⁴ and **Chishimba Kambwili v Attorney General**⁶ and submitted that this Court gave guidance to the Speaker of the National Assembly on the extent of authority. It was contended that the 2nd respondent usurped the powers of this Court when it interpreted the provisions of Article 72(4) of the Constitution.
- [18] The applicants also referred us to the case of **M’membe and Post Newspaper Ltd (In Liquidation) v Mboosi and Others**⁶ wherein the Supreme Court cited with approval the statement by the Court of Appeal of Seychelles in the case of **Houreaeu & Another v Karunakaran and Others**⁷ that:

...it is an age old and well-established principle that every court has power to act ex debito justitiae [as of right] to ensure that it exists for real and substantial administration of justice."

[19] It was finally submitted that for this Court to enforce its inherent power to interpret the Constitution and do substantial justice without compromise, this Court should send a serious warning to violators of the Constitution and all institutions that encroach on its powers.

[20] Submitting orally on behalf of the applicants, Mr. Ngulube asserted that the applicants' claim was brought pursuant to Order 4 rule 2 of the Constitutional Court Rules (CCR), as this matter relates to the interpretation of Article 72(4) of the Constitution. It was submitted that the impugned decision of the 2nd respondent dated 24th August, 2022 contravened the provisions of the Constitution as well as the national values and principles as contained in Articles 8 and 9 of the Constitution. It was Counsel's submission that the interpretation of the provisions of Article 72(4) borders on the will of the people and that this Court is empowered to act not only by its inherent jurisdiction but also the principles of justice. It was submitted that in this Court's decisions in **Law Association of Zambia V**

Attorney General⁴ and Chishimba Kambwili v The Attorney General⁶ this Court pronounced itself on the issues that have arisen. It was further submitted that a perception that the 2nd respondent can decide to create a set of disqualifications to disqualify a certain category of persons would diffuse the spirit of the national values and principles.

- [21] Counsel referred to the Supreme Court decision of **Fred M'membe and Post Newspaper (in Liquidation) v Mbozi and Others⁸** where it was stated as follows:

Justice must not only be done but should manifestly be seen to be done.

- [22] It was submitted that the above referred to case addresses the issue of perception which the cases of **Bowling Works v ED Works⁹** and **Scott v Scott¹⁰** touched on. It was submitted that the 2nd respondent overstepped its boundaries when it ignored Article 52 and referred to Article 72(4) only. It was Counsel's contention that in doing so the 2nd respondent performed the function of this Court which action is contrary to the guidance of this Court in the case of **Chishimba Kambwili v The Attorney**

General⁶ where the Court guided that the power to interpret the Constitution lies with this Court.

[23] It was contended that the decision of the 2nd respondent threatened and violated the provisions of Article 72(4) which it is not empowered to interpret. It was submitted that this Court should use its inherent jurisdiction and determine this matter in favour the 1st and 2nd applicants

[24] Mr. Zulu, the applicant's co-counsel, in augmenting submitted that the reading of Article 72(4) of the Constitution does not suggest that the 2nd respondent understood the provision. It was his submission that the 2nd respondent failed to distinguish between a nullification and a disqualification. That this Court in the case of **Law Association of Zambia v Attorney General**⁴ distinguished the two and that the 2nd respondent should have been guided by the decision of this Court.

[25] Counsel submitted that the two terms do not mean the same thing. It was Counsel's submission that disqualification is specific as it is an order of the Court to disqualify a person whose seat has been nullified. It was further submitted that this Court should ascribe the meaning it gave to Article 72(4) of the

Constitution in the case of **Law Association of Zambia v Attorney General**⁴. That this Court must ensure that substantial justice is done and make the relevant order. It was contended that even if the Court does not agree with the applicants, the issue is that the 2nd respondent misapplied Article 72(4) of the Constitution.

[26] With respect to whether this matter was properly before this Court, Mr. Zulu referred to the case of **Jonasimba v Attorney General**¹¹ and argued that this Court has jurisdiction to interpret the Constitution so as to deal with the matter exhaustively.

[27] Mr. Zimba, in further augmenting, submitted that in interpreting the Constitution it must be understood that the Constitution is a document that is *sui generis* and it has provided in Article 267(1) how it should be interpreted. He reiterated that this Court has jurisdiction to interpret the Constitution.

THE RESPONDENTS' CASE

[28] In opposing the applicant's case, the 1st respondent filed its affidavit in opposition and skeleton arguments on 29th August, 2022. In the said affidavit, it was averred that the 2nd

respondent is a body established by the Constitution and is mandated to conduct elections in the Republic. That it was also entitled to make any decision incidental to conducting elections as conferred on it by law.

- [29] It was averred that the applicants are challenging the 2nd respondent's guidance or warning to the prospective candidates in Kwacha and Kabushi Constituencies issued in a media statement dated 24th August, 2022. That the said guidance was issued to all prospective candidates in the by elections in the said Constituencies slated for the 15th September, 2022 and was not just addressed to the 1st and 2nd applicants. It was stated that there is nothing unconstitutional or illegal about the impugned guidance of the 2nd respondent and that the nominations of the 1st and 2nd applicants were rejected by the 2nd respondent in exercise of its constitutional mandate. That even assuming that the said guidance or decision to reject the nomination of the 1st and 2nd applicants was unconstitutional and illegal, the applicants have adopted a wrong procedure to move the Court. Further, that there is a prescribed procedure for any candidate

whose nomination has been rejected by the 2nd respondent in the Electoral Process (General) Regulations.

[30] In the 1st respondent's skeleton arguments, it was submitted that it is not the relief sought that determines the mode of commencement but it is the Constitution and the enabling legislation that dictate the mode of commencement. The 1st respondent referred to the case of **Newplast Industries v Commissioner of Lands and Another**¹² where it was held that:

It is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute.

[31] It was submitted that the mode of commencement of actions before this Court is provided for under Order IV of the Constitutional Court Rules, 2016 which provides that:

1. Except as otherwise provided in the Constitution, the Act and these Rules, all matters under the Act brought before the Court shall be commenced by a petition in Form I set out in the Schedule...

2. (1) The following matters shall be commenced by originating notice of motion...

.....

2. (2) a matter relating to the interpretation of the Constitution shall be commenced by originating summons.

[32] The 1st respondent submitted that the import of the foregoing is that all matters before the Constitutional Court are commenced by way of a Petition as a general rule except when the Constitution, the Constitutional Court Act, 2016 and the Constitutional Court Rules, 2016 direct otherwise.

[33] The 1st respondent referred to the case of **Chikuta v Chipata Rural Council**¹³ where it was held that the mode of commencement goes to jurisdiction. They also referred us to this Court's decision in the case of **Vincent Lilanda and 2 Others v Attorney General**¹⁴ wherein we held, inter alia, that:

...the mode of commencement determines the jurisdiction of the Court.

[34] It was further submitted that in the case of **Kabisa Ngwira v National Pension Scheme Authority**¹⁵ this Court stated that:

The mode of commencement of a matter affects the jurisdiction, therefore, a matter that is wrongly commenced cannot be considered as a procedural technicality to fall under the provisions of Article 118(2)(e) of the Constitution.

[35] Reference was further made to the case of **JCN Holdings Limited v Development Bank of Zambia**¹⁶ to emphasise that it is settled law that if a matter is not properly before a court, that

court has no jurisdiction to make any orders or grant any remedies. That this was the position established in **Chikuta v. Chipata Rural Council**¹³.

[36] Submitting further, we were referred to our decision in the case of **Charles Mukanda v Attorney General**¹⁷ where we held as follows:

In the Kabisa Ngwira v National Pension Scheme Authority case, the applicant wrongly commenced the matter by way of Originating Summons when the applicant's case was predicated on the fact that the respondent had breached or contravened Articles 187 and 189 of the Constitution. In dismissing the matter for being wrongly commenced before this Court, we held that:

"all matters relating to the alleged breach, violation or contravention of constitutional provisions ought to be commenced before this Court by way of petition. Further, except as otherwise provided in the law, all matters brought before the Court ought to be commenced by way of petition. This applies to matters that contain a combination of issues arising from an alleged breach or contravention of the Constitution and an attendant interpretation of constitutional provisions, because this Court will go through the rigorous process of interpreting a provision in dispute before arriving at a decision as to whether the provision has been contravened or not.

Where a party exclusively seeks an interpretation of constitutional provisions, Order IV r. 2(2) of the Constitutional Court Rules guides that such matters ought to be commenced by originating summons."

[37] According to the 1st respondent, the applicants in the present case wrongly commenced this action by way of originating summons when this matter clearly contains a combination of

issues arising from an alleged breach of the Constitution and an attendant interpretation of constitutional provisions. The 1st respondent also referred to the case of **Isaac Mwanza v the Attorney General**¹⁸ to further support their arguments.

[38] It was further submitted that on the basis of the **Charles Mukanda**¹⁷ and **Isaac Mwanza**¹⁸ cases referred to, this Court is devoid of jurisdiction to determine the questions set out in the originating summons and therefore the applicants' originating summons is incompetently before this Court and must be dismissed.

[39] It was further argued that the real intention of the applicants was to challenge the nomination process as conducted by the 2nd respondent and that the Electoral Process Act sufficiently makes provision for one who wishes to challenge the nomination process. It was submitted that Regulation 18(7) of the Electoral Process General Regulations provides that:

The determination of the returning officer that a nomination is valid or invalid is final unless challenged through an election petition in accordance with Article 52 (4) of the Constitution.

[40] In the alternative, it was argued that even assuming that this Court takes the view that the applicants' originating summons is

correctly before this Court, the applicants' interpretation of Article 72(4) is misconceived and premised on the wrong interpretation of the law.

[41] It was submitted that the operative provision in this matter is Article 72(2)(c) which provides that:

The office of Member of Parliament becomes vacant if the member

....

(c) Acts contrary to a prescribed code of conduct.

[42] According to the 1st respondent's submission, Article 72(2)(c) was never discussed or contextualized in the cases of **Charlotte Scott v Margaret Mwanakatwe and Electoral Commission of Zambia**¹⁶ and **Law Association of Zambia v The Attorney General**⁴. That in the above cases, the Court dealt with the difference between disqualification and nullification and the Court did not touch on Article 72(2)(c).

[43] It was submitted that the operative clause in the present case is Article 72(2) (c) owing to the election malpractices committed by the applicants as evidenced by the judgments of this Court in the cases of **Joseph Malanji v Charles Abel Mulenga and Electoral**

Commission of Zambia⁵ and Bowman Lusambo v Bernard Kanengo and Electoral Commission of Zambia⁶.

[44] In orally responding to the 1st and 2nd applicants' submissions, the learned Attorney General Mr. Kabesha, SC handled the first hinge of their response namely, the mode of commencement by way of originating summons while the Solicitor General handled the second hinge to do with the interpretation of Article 72(4). It was the learned Attorney General's submission that questions (1), (2) and (3) of the originating summons were not proper questions for an originating summons and as such this Court had no jurisdiction to entertain them in light of our recent decision in the case of **Jonas Zimba v Attorney General**¹¹.

[45] That with the exception of question 4, this Court has no jurisdiction to hear matters relating to nominations as any challenges to nominations for Parliamentary elections is the preserve of the High Court. The Attorney-General referred us to the case of **Munir Zulu v Gertrude Pilila Mwanza**²⁰ to support his argument.

[46] It was the Attorney General's submission that only question (4) on what is meant by causing a vacancy in the National Assembly could pass the test for an originating summons question. It was further submitted that mode of commencement of an action affects the jurisdiction of the Court and in this regard, we were reminded of our own decision in the case of **Kabisa Ngwira v NAPSA**¹⁵. The Attorney General concluded by stating that this was a matter suitable for expunging questions (1), (2) and (3) and only determine question (4).

[47] In arguing the second limb of the 1st respondent's case, Mr. Muchende SC, Solicitor General, submitted that the provisions of Article 72(4) of the Constitution were not to be treated in isolation of other provisions of the Constitution. He went on to argue that the true import of Article 72(2) of the Constitution was the debate in the **Law Association of Zambia v Attorney General**⁴ matter and this is where the debate is even in *casu*. He submitted that Article 72(2)(h) does not require the Constitutional Court to expressly state that a member has been disqualified but makes reference to the resultant effect of the decision of the Court in effectively rendering a member ineligible

to continue holding office of Member of Parliament. The learned Solicitor General went on to state that Article 72(2)(b) and (h) is a metamorphosis by which a Member of Parliament becomes ineligible as a result of the decision of the Court and not as a result of the express decree of the Court. It was further submitted that the word disqualified as used in the **Law Association of Zambia v Attorney General**⁴ case was problematic and that the Court had an opportunity before it to revisit that decision. It was the 1st respondent's contention that the meaning of the word disqualified has to change.

- [48] The 2nd respondent filed their affidavit in opposition on 29th August, 2022. It was averred that in the performance of its functions, the 2nd respondent is guided by electoral laws which include the Constitution, the Electoral Process Act 2016 and the Regulations promulgated thereunder. It was stated that the Kabushi and Kwacha Constituency elections were nullified by the Constitutional Court on appeal from the High Court through judgments dated 28th July, 2022 and 3rd August, 2022 respectively.

- [49] That the 2nd respondent issued a media statement to all aspiring candidates for the said by-elections informing them of the guidelines on the filing of nominations for the seats that had been nullified. The said media statement did not target any person but was a general guidance on the nomination process for all aspiring candidates.
- [50] According to the 2nd respondent, the media statement was not illegal but was an administrative function of the 2nd respondent of informing aspiring candidates on the guidelines and requirements for nominations in line with the powers vested in the 2nd respondent under the Constitution. That on 24th August, 2022, the 2nd respondent together with all the aspiring candidates developed a timetable indicating the time when each candidate and political party would file their nominations and the said timetable included both applicants. Copies of the timetables for Kabushi and Kwacha Constituencies were exhibited.
- [51] It was stated that both applicants participated in the nomination process and filed in their nominations on 25th August, 2022 contrary to the assertions by the applicants in the affidavit in

support of the originating summons. That the 2nd respondent did not assume the role of interpreting the Constitution but was following the provisions of the Constitution. It was further stated that the 2nd respondent is bound by all the constitutional provisions relating to nominations and decisions of the Courts. That the 2nd respondent acted within its constitutional mandate regarding the conduct of nominations for the by-elections.

- [52] Ms. Phiri, Counsel for the 2nd respondent, in orally augmenting submitted that it had issue with the mode of commencement deployed by the 1st and 2nd applicants as a perusal of the originating summons and accompanying affidavit point to questions challenging the nominations of the applicants. It was the 2nd respondent's submission that the mode of commencement is prescribed by statute and that with regard to challenging issues to do with nominations, Article 52(4) is instructive to the effect that such matters are to be commenced by election petition. That this is further supported by Regulation 19(7) of the Electoral Process General Regulation SI No. 63 of 2016. It was Ms. Phiri's submission that the issues that have

been raised in the originating summons should have come through an election petition.

APPLICANTS' REPLY

[53] The applicants filed in their affidavit in reply on 30th August, 2022 and averred that the 2nd respondent had admitted that the media statement complained of was issued a day before nominations. The applicants stated that while the statement was not illegal, it was issued in bad-faith. It was averred that although the 2nd respondent states that the media statement did not target anyone, the wording and the enforcement of the said decision was drafted in such a way as not to affect Local Government candidates but specifically referred to the National Assembly where the applicants lost their seats and as such, were the targets.

[54] It was further averred that the applicants were the ones whose seats were nullified by the courts and despite no merition of their names, they were accused of having caused the vacancies in the National Assembly and hence the discrimination. That they were never given an opportunity to be heard on the said allegations as

would have ordinarily been expected but because the media statement was intended to block them from re-contesting, they were disqualified even before they presented their nomination papers, such that the presentation of their nomination papers was not going to change the 2nd respondent's decision.

[55] It was stated that there was nothing in the relevant electoral laws referred to by the 2nd respondents which gave them the mandate to interpret the clauses of Article 72(4) of the Constitution before, during and after nullifications. That the mandate of the 2nd respondent does not even extend to disqualifying candidates whose seats have been nullified by the courts unless the Court in nullifying the seats does so. That this Court did not disqualify the applicants from re-contesting their seats.

[56] It is further stated that the decision in the media statement was not an administrative action but a judicial function which is the delicate task given to the Judiciary and not the 2nd respondent. That apart from illegally interpreting the Constitution, the 2nd respondent disqualified them after a nullification without any lawful authority to do so. Further, that there were no guidelines given in the media statement save to discriminate against the

applicants by virtue of this Court's nullification and as such they were treated in a manner less favourable and unconstitutionally.

[57] It was contended that the applicants attempted to file their nomination papers on 25th August, 2022 by tendering their qualifications to the respective returning officers. That all the requirements were met but they were rejected as a result of the 2nd respondent's interpretation of Article 72(4) of the Constitution and stating that they were not eligible to stand after their seats were nullified.

[58] It was further stated that the 2nd respondent by accepting their payments created a legitimate expectation that they would be allowed to contest which now must be enforced against them. That the contents of the media statements were not only used but repeated to the applicants on 25th August, 2022 when they presented their nomination papers. It is stated that only the Patriotic Front (PF) Party candidates were rejected in both by-elections as a result of the media statement.

[59] It was contended that the returning officers exceeded their mandate and acted illegally by creating an interpretation not sanctioned by this Court. That the Court should determine the

questions in the originating summons and that the Court should set aside the decision of the 2nd respondents as the decision was illegal *ab initio*.

[60] That while the Returning Officer has power to reject the 1st and 2nd applicant's nomination papers based on qualifications, his mandate did not extend to him interpreting Article 72(4) of the Constitution which he said barred the 1st and 2nd applicants and disqualified them after a nullification. That the 2nd respondent's decision affected the will of the electorate who are the rightful people to choose who should represent them in the National Assembly.

[61] In the applicants' oral submissions, Mr. Zulu submitted that the 1st Respondent conceded that nullification and disqualification are two different issues. That there is nothing that distinguishes the **Law Association of Zambia**⁴ case and this case for this Court to be asked to change the meaning of nullification and disqualification, except that in the earlier case there were no faces to it whereas in the present case there are faces to the issues that have arisen.

- [62] With regard to the 1st respondent's contention that only question 4 was viable for interpretation by this Court, it was submitted that should the Court agree with that position it should not just deal with question 4 without considering other issues. That this Court made reference to the case of **Shamwana and 7 Others v the People**²¹ on when it can take judicial notice.
- [63] It was argued that from the foregoing, it is clear that this Court after interpreting Article 72(4) is called upon to ensure that substantial justice is done.
- [64] It was submitted that the issue in contention was not the invalidity or validity of a nomination but the misunderstanding of Article 72(4) as was ruled on in **Law Association of Zambia V Attorney General**⁴. That in making this correction this Court was asked to make necessary orders to rectify the error of the interpretation of the law by the 2nd respondent.
- [65] In further supplementing the applicants' arguments in reply, Mr. Ngulube argued that challenging nominations under Article 52 could not be applicable to the applicants because the 1st and 2nd applicants did not file in their nominations and therefore there were no nominations to challenge. He submitted that this Court

should determine whether in nullifying the seats of the 1st and 2nd applicants, the Court disqualified them.

[66] Mr. Chirwa submitted that in the case of **Institute of Law, Policy, Research and Human Rights v Attorney General**, this Court held that there should be factual situations to support an application for interpretation of the Constitution. That in *casu* what happened in the Kwacha and Kabushi Constituencies were factual events that the Court should take into account in light of the questions that have been posed for interpretation. It was submitted that questions 1, 2 and 3 were also properly before this Court and that the **Jonas Zimba**¹¹ case had been misconstrued and could be distinguished.

ANALYSIS AND DECISION

[67] We have considered the originating summons, affidavit in support and accompanying skeleton arguments, the opposing affidavits and accompanying skeleton arguments. The applicants have moved this Court seeking the determination of the following questions which we will restate for ease of reference:

- 1. Whether the decision of the Electoral Commission of Zambia dated the 24th August, 2022 is illegal, null and void;**

2. Whether the applicants are eligible to contest the 15th September, 2022 by-elections;
3. Whether fresh nominations should be conducted to allow the applicants participate in the by-elections.
4. What is meant by causing a vacancy in the National Assembly as stated in Article 72 of the Constitution.

[68] The applicants contend that the decision by the 2nd respondent contained in the media statement issued on 24th August, 2022 was an attempt to prevent them from re-contesting in the 15th September, 2022 by-elections by creating a disqualification that is neither legal nor constitutional. It is further contended that the 2nd respondent exceeded its mandate as provided by the Constitution in disqualifying the applicants because they rendered an interpretation to Article 72(2)(h) of the Constitution.

[69] The crux of the 1st respondent's challenge to the applicants' originating summons is that the mode of commencement is wrong and therefore this Court lacks jurisdiction to determine this matter. He referred us to a number of our decisions including the case of **Charles Mukanda v The Attorney General**¹⁷ where we referred to our earlier decision on mode of commencement in **Isaac Mwanza v The Attorney General**¹⁸.

[70] The 2nd respondent's opposition is mainly that there is nothing that it did that exceeded its mandate and that the media statement was merely a guide to the aspiring candidates on the nomination process. The 2nd respondent further contends that the evidence on record shows that it allowed the applicants to file their nominations and it did not assume the role of interpreting the Constitution as alleged by the applicants.

[71] In determining this matter, it is imperative that we begin by dealing with the 1st respondent's challenge that the matter has been commenced by a wrong mode of commencement as this raises a jurisdiction issue. The 1st respondent referred us to our previous decisions in **Isaac Mwanza v Attorney General**¹⁸ and **Charles Mukanda v Attorney General**¹⁷ where we dismissed matters on account of having been commenced by a wrong mode of commencement.

[72] In our recent decision in **Jonas Zimba v Attorney General**¹¹ referred to by both parties we distinguished the jurisdictional issues raised in the **Isaac Mwanza**¹⁸ case.

[73] We stated, in the **Jonas Zimba v Attorney General**¹¹ case at pages J5-J6, that:

In Isaac Mwanza v Attorney General the Applicant sought interpretation of various Articles in relation to a number of questions challenging the constitutionality of specific appointments and disappointments made by the incumbent Republican President.

[74] We further referred to our guidance in the case of **Vincent Lilanda and 2 Others v Attorney General**¹⁴ and added that:

We are fortified in so saying by our decision in the case of Vincent Lilanda and 2 Others v Attorney General wherein the questions before us included one for sole interpretation of a Constitutional provision while the rest sought determination of contentious issues.

We were able to dispose of the interpretation question and dismiss (for coming by wrong mode) the contentious question which, though founded on the interpreted provisions, required a proper trial for their determination.

[75] In the **Jonas Zimba**¹¹ case, we went on to find that question 2 was the crux of the applicant's case and was amenable to consideration on the merits because it asked a constitutional question once it was isolated from the dismissed questions.

[76] In the case before us the applicants have raised questions for determination and interpretation of Article 72 of the Constitution. They have also sought a remedy for us to declare as illegal, null and void the decision of the 2nd respondent dated 24th

August, 2022. In light of our decision in **Jonas Zimba v Attorney General**¹¹, we will proceed to deal with only that question that is solely for the interpretation of the Constitution and will not consider matters, which in our view, are contentious and require to be brought by way of Petition. It is our view that the questions raised in (1), (2) and (3) cannot be dealt with on their merits as they are not properly before us and are accordingly dismissed.

[77] In light of the foregoing, we are of the considered view that question (4) is the only question that is properly before us as it solely seeks for interpretation of the term *causing a vacancy* in the National Assembly within the context of Article 72 of the Constitution.

[78] The backdrop of determining question (4) is that the applicants allege that the 2nd respondent in a media statement announced that it would not accept nomination from candidates who had caused a vacancy in the National Assembly. That by virtue of Article 72(4) the applicants could not be allowed to recontest the

elections because they are captured under clause (4) of Article 72.

[79] The 1st respondent contends that the applicants are captured by Article 72(2)(c) and therefore the decision not to accept nominations on the premise of Article 72(4) was well founded. The 2nd respondent contends that there is nothing illegal about giving guidance to the aspiring candidates of the nomination process.

[80] We have carefully considered the issues for determination raised by the applicants in the originating summons. Our starting point in interpreting Article 72 is considering the provisions of Article 70(1) and (2) which provide for who is eligible to contest an election as a Member of Parliament and who is disqualified from being elected as a Member of Parliament.

[81] Article 70(1) and (2) of the Constitution provides that:

70. (1) Subject to clause (2), a person is eligible to be elected as a Member of Parliament, if that person—

(a) is a citizen;

(b) is at least twenty-one years old;

(c) is a registered voter;

(d) has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent; and

(e) declares that person's assets and liabilities, as prescribed.

(2) A person is disqualified from being elected as a Member of Parliament if that person—

- (a) is validly nominated as a candidate in a presidential election;**
- (b) is a public officer or Constitutional office holder;**
- (c) is a judge or judicial officer;**
- (d) has a mental or physical disability that would make the person incapable of performing the legislative function;**
- (e) is an undischarged bankrupt;**
- (f) is serving a sentence of imprisonment for an offence under a written law;**
- (g) has, in the immediate preceding five years, served a term of imprisonment of at least three years;**
- (h) has, in the immediate preceding five years, been removed from public office on grounds of gross misconduct; or**
- (i) holds or is acting in an office, as prescribed, the functions of which involve or are connected with the conduct of elections.**

[82] As we have already noted, Article 70 provides for a person who is eligible to be elected as a Member of Parliament and one who is disqualified from being elected. Put differently the provision is dealing with eligibility to stand as Member of Parliament and disqualifications to stand as Member of Parliament.

[83] Further, Article 72 provides for when the office of a Member of Parliament becomes vacant. Article 72(2) and (4) dealing with vacancy in the National Assembly provides that:

72. (2) The office of Member of Parliament becomes vacant if the member—

- (a) resigns by notice, in writing, to the Speaker;**
- (b) becomes disqualified for election in accordance with Article 70;**
- (c) acts contrary to a prescribed code of conduct;**
- (d) resigns from the political party which sponsored the member for election to the National Assembly;**

- (e) is expelled from the political party which sponsored the member for election to the National Assembly;**
- (f) ceases to be a citizen;**
- (g) having been elected to the National Assembly, as an independent candidate, joins a political party;**
- (h) is disqualified as a result of a decision of the Constitutional Court; or**
- (i) dies.**
- (4) A person who causes a vacancy in the National Assembly due to the reasons specified under clause (2) (a), (b), (c), (d), (g) and (h) shall not, during the term of that Parliament—**
 - (a) be eligible to contest an election; or**
 - (b) hold public office.**

[84] Article 72(2)(a) to (i) outlines the instances when a Member of Parliament can vacate office. However, Article 72(4) is categorical and clearly states that vacancies created as a result of the reasons in clause 72(2)(a),(b),(c),(d),(g) and (h) disqualify a person from contesting the election or hold public office. In our view, this means that while such a candidate may be eligible to stand for elections as Member of Parliament in accordance with Article 70(1), if a person falls under those instances highlighted in Article 72(4) they will not qualify to contest the election within the time frame specified in Article 72(4) of the Constitution.

[85] In order to appreciate the import of the restrictions contained in Article 72(4) we found it necessary to look at the history of this provision. The precursor to the Constitution of Zambia (Amendment) Act No. 2 of 2016 did not have a provision that

restricted a Member of Parliament from re-contesting an election upon causing a vacancy. Article 67 of the 1996 Constitution provided that:

(1) When a vacancy occurs in the seat of a member of the National Assembly as a result of the death or resignation of the member or by virtue of Article 71, a by-election shall be held within ninety days after the occurrence of the vacancy.

(2) Parliament may by an Act of Parliament prescribe the manner in which a by-election shall be held.

[86] Article 71 of the same Constitution provided for when a member of Parliament vacates office. This Article provided as follows:

(1) Every member of the National Assembly, with the exception of the Speaker, shall vacate his seat in the Assembly upon the dissolution of the National Assembly.

(2) A member of the National Assembly shall vacate his seat in the Assembly –

(a) if he ceases to be a citizen of Zambia;

(b) if he acts contrary to the code of conduct prescribed by an Act of Parliament;

(c) in the case of an elected member, if he becomes a member of a political party other than the party, of which he was an authorised candidate when he was elected to the National Assembly or, if having been an independent candidate, he joins a political party or having been a member of a political, he becomes an independent;

(d) if he assumes the office of President;

(e) if he is sentenced by a court in Zambia to death or to imprisonment, by whatever name called, for a term exceeding six months;

(f) if any circumstances arise that, if he were not a member of the Assembly, would cause him to be disqualified for election as such under Article 65;

(g) if, under the authority of any such law as is referred to in Article 22 or 25 –

(i) his freedom of movement has been restricted or he has been detained for a continuous period exceeding six months;
(ii) his freedom of movement has been restricted and he has immediately thereafter been detained and the total period of restriction and detention together exceeds six months; or
(iii) he has been detained and immediately thereafter his freedom of movement has been restricted and the total period of detention and restriction together exceeds six months.

[87] This provision is similar to the provisions of Article 72(2) of the Constitution (Amendment) Act No. 2 of 2016 in that it also provided for similar instances when a vacancy arose in the National Assembly.

[88] As we earlier noted, the 1996 Constitution did not have a provision similar to Article 72(4) in the 2016 Constitution. There was concern that was expressed over this gap in the 2005 Mung'omba Constitution Review Commission Report. In the Final Report of the Constitution Review Commission at page 386, it found that the overwhelming majority of petitioners called for a Member of Parliament who resigned from a party or crossed the Floor to be barred from contesting by-elections for the remainder of the life of that Parliament. The Commission went on to recommend, at page 387 to 388 that:

“where a vacancy arises due to nullification of an election, death, incapacitation of an MP or where a vacant seat was held by an independent MP, a by-election should be held;

an MP who resigns from a party or joins another party should lose the seat and not be eligible to contest byelections for the duration of that Parliament;”

[89] A similar aspect was raised when considering Article 72 by the Technical Committee on Drafting the Constitution on page 385 of the Report of the Technical Committee on Drafting the Zambian Constitution 2013. It was resolved by the National Convention that Members of Parliament should not cross the floor in order to prevent unnecessary by-elections, wastage of resources and to strengthen democracy. The Technical Committee, at page 388 of the Report, resolved to penalize a person who causes a vacancy in the National Assembly due to some of the reasons stated in clause 2 of Article 72.

[90] The question that we have to determine is what vacancies under Article 72(2) will trigger Article 72(4) of the Constitution. To begin with, vacancy is defined in Black’s law Dictionary as:

The state of lack of occupancy in an office, post or piece of property.

[91] The Constitution in Article 72(2) stipulates the ways in which a vacancy in the National Assembly is caused. We found it

necessary to outline the nature of the vacancies that are contemplated under Article 72(2). Article 72(2)(a) of the Constitution contemplates a vacancy that is created due to the resignation of a Member of Parliament. A resignation is a voluntary act which is defined in Black's Law Dictionary as:

“the act or an instance of surrendering or relinquishing an office, right or claim.”

[92] Article 72(2)(b) contemplates a vacancy that will arise when a Member of Parliament falls under the disqualifications stipulated in Article 70 which we highlighted earlier in this Judgment. The vacancy created under Article 72(2)(c) is where a Member acts contrary to a prescribed Code of Conduct. The 1st respondent contends that the 1st and 2nd applicants fell under this provision and therefore were captured under Article 72(4). We find it necessary to consider what is referred to by this Code of Conduct. Article 71 of the 1996 Constitution contained a similar provision which provided for a vacancy that arises when a member acts contrary to the Code of Conduct. In light of this provision we had occasion to consider the Parliamentary and

Ministerial Code of Conduct Act No. 35 of 1994 of the Laws of Zambia. The long title of this Act provides as follows:

An Act to establish a code of conduct for Ministers and Deputy Ministers for the purposes of Article 52 of the Constitution; to establish a code of conduct for Members of the National Assembly for the purposes of Article 71 of the Constitution; and to provide for matters connected with or incidental to the foregoing. (emphasis added)

- [93] It is evident from the title that this Act was an Act to also provide for a Code of Conduct for Members of Parliament that was contemplated in Article 71 which provided for members vacating office under that Constitution. We note that there was a change in the wording of Article 72(2)(c) which is phrased as follows:

“acts contrary to “a” prescribed Code of Conduct”

- [94] Article 71(2)(b) of the 1996 Constitution on the other hand stated that:

“if he acts contrary to “the” code of conduct prescribed by an Act of Parliament”

- [95] While we have noted the difference in wording of the two provisions, it is our considered view that both provisions speak to a Code of Conduct that is peculiar to serving Members of Parliament. It is our considered view that the Code of Conduct contemplated under the 1996 Constitution and the one that is

contemplated in the current Constitution is not one that regulates candidates to an election but to serving Members of Parliament. We hold the firm view that Article 72(2)(c) does not apply to the Electoral Code of conduct which governs all candidates and the 2nd respondent in the conduct of elections. We therefore find that the 1st respondent's argument on this aspect is flawed.

[96] With regard to the vacancies that arise under Article(72)(2)(d), (e) and (g), these contemplate a situation where a Member of Parliament resigns from the political party which sponsored him in the election or where he is expelled from the political party or in an instance where an independent member decides to join a political party, respectively.

[97] Article 72(2)(f) and (i) relate to a vacancy arising from a Member of Parliament ceasing to be a citizen of Zambia or where there is a death of a Member of Parliament.

[98] With respect to a vacancy arising under Article 72(2)(h), it speaks to a vacancy that arises where a Member of Parliament is disqualified from holding the office of Member of Parliament. The 2nd respondent in the impugned media statement contended that

the 1st and 2nd applicants were disqualified from re-contesting the by election on account of Article 72(2)(h).

[99] The 1st and 2nd respondents contend that the nullification of the 1st and 2nd applicants' elections amounted to a disqualification by this Court that is contemplated under Article 72(2)(h). That in view of that, the applicants were not eligible to contest in the by-elections that were being held for their respective Constituencies.

[100] It is imperative that we consider whether the disqualification under Article 72(2)(h) relates to a nullification of an election.

[101] We had occasion to discuss the distinction between a vacancy in the National Assembly as a result of a nullification of an election and disqualification in light of Article 72(2)(h). In the case of **Law Association of Zambia v Attorney General**⁴ we interpreted the terms nullify and disqualify as follows:

The two words “nullify and disqualify” cannot be used interchangeably as they mean different things. Black’s Law Dictionary defines nullify to mean “to make void: to render invalid”. It further defines disqualification to mean *inter alia*: “the act of making ineligible; the fact or condition of being ineligible”. It further defines it as the “punishment that may be imposed after an official has been impeached and removed from office, precluding the official from holding another office or enjoying any benefits of having held office”. Therefore, the disqualification which is covered under Article 72(2)(h) is distinct from the nullification of an election by the High Court following the determination of an election petition or subsequently by the

Constitutional Court on appeal. Further, when Article 72(2)(h) is read together with Article 70(2) and Article 72(4) the implications on disqualification are materially different from nullification of an election.

In sum, Article 72(2)(h) provides for one instance where a vacancy occurs in the National Assembly through a disqualification of a Member of Parliament by a decision of this Court as distinct from a decision of this Court on appeal pursuant to Article 73(3) read with Article 128(1)(d) of the Constitution. It is evident from the foregoing that while Article 72(2) of the Constitution provides for instances when the office of Member of Parliament becomes vacant, it does not provide for a vacancy triggered by the nullification of an election by the High Court where there is no appeal. It also does not provide for the occurrence of a vacancy in the National Assembly following a decision of this Court to uphold the nullification of an election by the High Court or by the reversal of a decision of the High Court not to nullify the election of a Member of Parliament, as the case maybe. The argument therefore that section 108 (4) addresses the lacuna is untenable in view of Articles 57, 73 (3) and 128 (1) (d) of the Constitution. (Emphasis Added)

[102] In that case we made it clear and we will restate our position that Article 72(2)(h) refers to a vacancy created in the National Assembly through a disqualification of a Member of Parliament by a decision of this Court. We are of the considered view that this decision is as a result of an action where this Court is moved to determine whether a Member of Parliament is disqualified to hold that office as was the case in the case of **Bizwayo Nkunika v Lawrence Nyirenda**²². On the other hand, the vacancy resulting from nullification of an election, as we did in the instance of the applicants in this matter, is covered by Article

73(3). It is our view that Article 72(4) is categorical that a person who causes a vacancy in the National Assembly due to the reasons specified under clause (2)(a),(b),(c),(d), (g) and (h) shall not during the term of that Parliament be eligible to contest the election or hold public office. The reasons in the aforementioned clauses are:

- (a) **A Member of Parliament who resigns by notice, in writing, to the Speaker;**
- (b) **A Member of Parliament who becomes disqualified for election in accordance with Article 70;**
- (c) **A Member of Parliament who acts contrary to a prescribed code of conduct;**
- (d) **A Member of Parliament who resigns from the political party which sponsored the member for election to the National Assembly;**
- (g) **A Member of Parliament having been elected to the National Assembly, as an independent candidate, joins a political party; or**
- (h) **A Member of Parliament who is disqualified as a result of a decision of the Constitutional Court.**

[103] We stated in the case of **Law Association of Zambia v Attorney General**⁴ that the disqualifications referred to in Article 72(2)(h) does not include a vacancy that is created by nullification of an election under Article 73(3) of Constitution.

[104] It therefore follows that a candidate whose seat was nullified by the High Court or this Court or whose nullification was upheld by this Court does not fall under those

instances referred to under Article 72(4). To further support this position, we considered the provisions of section 97(2)(b) of the Electoral Process Act which provide that:

The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—

(a) ...

(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election;

[105] A careful reading of this provision reveals that it contemplates a nullification of an election that is not triggered by a candidate or his duly appointed agent. That being the case, if a nullification were to be occasioned under section 97(2)(b), an interpretation of Article 72(2)(h) in the manner done by the 2nd respondent would mean that such a candidate would be penalized and not be allowed to re-contest in an election that was voided on account of the 2nd respondent's conduct of the election. This in our view would lead to an absurdity in the interpretation of Article 72(2)(h).

[106] The 1st respondent in the alternative has contended that the 2nd applicant is disqualified from contesting the by-elections because he falls under Article 70(2)(h) which provides that:

(2) A person is disqualified from being elected as a Member of Parliament if that person—

h) has, in the immediate preceding five years, been removed from public office on grounds of gross misconduct;

[107] The 1st respondent referred us to the definition of public office to include a Member of Parliament. We have considered the 1st respondent's industrious arguments. We will begin by referring to Article 72(1) of the Constitution which provides that:

(1) A Member of Parliament shall, except the Speaker and the First Deputy Speaker, vacate the seat in the National Assembly upon a dissolution of Parliament.

[108] This provision stipulates that once Parliament is dissolved, a Member of Parliament's seat becomes vacant. This means that there is no person who is holding the office of Member of Parliament. This is the case when Parliament is dissolved in anticipation of elections. It is our view that at the point when the general elections to fill the seats of the National Assembly are held, there are no serving Members of Parliament as Parliament would have been dissolved. It therefore follows that any action

that is done by candidates during elections is governed by the Electoral Process Act and the Electoral Code of Conduct.

[109] It is our firm view that where an elected Member of Parliament is found to have breached the provisions of the Electoral Process Act and their election is subsequently nullified, their misconduct or illegal practices were not done in their capacity as a Member of Parliament but as a candidate for the election as a Member of Parliament. We therefore do not agree that Article 70(2)(h) refers to a Member of Parliament whose seat has been nullified for electoral malpractices or misconduct. We find no merit in this argument.

[110] In view of the foregoing, we are of the considered view that the applicants whose seats were nullified by the High Court or this Court do not fall in the category of those who cannot contest an election under Article 72(4).

[111] In conclusion we find that Article 72(4) has specified which categories of candidates cannot contest an election and these are specified in Article 72(2)(a),(b),(c),(d),(g) and (h). That said, these do not include those members whose seats fell vacant by virtue of a nullification of an election.

[112] In view of the nature of this matter we hold the view that it is in the interest of justice each party bears its own costs.



.....
P. MULONDA
CONSTITUTIONAL COURT
JUDGE



.....
M.S. MULENGA
CONSTITUTIONAL COURT
JUDGE



.....
M. K. CHISUNKA
CONSTITUTIONAL COURT
JUDGE



.....
J. Z. MULOMGOTI
CONSTITUTIONAL COURT
JUDGE

Munalula DPC dissenting:

Cases referred to:

1. Speaker of the Senate and another [2013] eKLR (Advisory Opinion No. 2 of 2013)
2. Law Association of Zambia v Attorney General 2021/CCZ/0051
3. Bizwayo Newton Nkunya v Lawrence Nyirenda and the Electoral Commission of Zambia 2019/CCZ/005
4. Hajra Import & Export Limited v Zambia Revenue Authority Appeal No.48/98
5. Irwin v The People (1993-1994) Z.R. 7
6. Afritec Asset Management Company Limited and Another v The Gynae and Antenatal Clinic Limited and Another Selected Judgment No. 11 of 2019
7. The State v T Makwanyane and M Mchunu CCT/3/94
8. Mutharika and ECZ v Chilima and Chakwera MSCA Constitutional Appeal No.1 of 2020
9. Joseph Busenga v Attorney General 2021/CCZ/0049
Sampa John v Brian Mundubile and the Electoral Commission of Zambia 2021/CCZ/A0036

Legislation referred to:

The Constitution of Zambia as amended by the Constitution (Amendment) Act No. 2 of 2016
Electoral Process Act No. 35 of 2016
Constitutional Court Rules S.I.No.37 of 2016

Works referred to:

Black's Law Dictionary, 8th Edition
Oxford Online Dictionary

INTRODUCTION

[113] This is my full dissenting opinion on the interpretation of Article 72.

[114] I wish to begin by agreeing with the Majority that the originating Summons before us is amenable to interpretation in relation to question 4 which seeks the meaning of Article 72 of the Constitution of Zambia as amended by Act No. 2 of 2016 (henceforth “the Constitution”). I shall therefore consider only the said question in my opinion. Question 4 reads:

What is meant by causing a vacancy in the National Assembly as stated in Article 72 of the Constitution.

[115] My dissent relates to the meaning given to Article 72 which has the effect of excluding ‘causing a by-election through the nullification of an election’ from its purview.

CONSIDERATION AND DECISION

[116] I begin my interpretation of Article 72 in the same way I approach any interpretation or determination of proceedings that is, anchored by the need to fulfil my mandate which is to protect the Constitution and the integrity of the institutions it creates.

[117] Comfort for my approach is found in the Kenyan case of **Speaker of the Senate and another**¹ wherein at paragraph 156

Mutunga Chief Justice and President of the Supreme Court as he then was, said:

Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship-gaps; and settle constitutional disputes. In other words, constitution-making does not end with its *promulgation*; it continues with its *interpretation*. It is the duty of the Court to illuminate legal penumbras that constitutions borne out of long drawn compromises, such as ours, tend to create. The constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. The limitations of mind and hand should not defeat the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.

[118] With this in mind, I have carefully read Article 72 in light of Articles 8, 267, 70 and 73 of the Constitution. Articles 8 and 267 of the Constitution are important because they give context to what I believe is the proper meaning of Article 72. Articles 70 and 73 are closely related to Article 72 hence it cannot be read in isolation of them.

[119] I find solace in Article 8 of the Constitution which provides for the national values and principles, of morality and ethics; democracy and constitutionalism; good governance and integrity. I also find refuge in Article 45 of the Constitution. Article 45 contains the principles of the electoral systems and process. Under it, the systems and process must ensure among other things that elections are fair and free of violence, intimidation and corruption.

[120] I now turn to the substantive interpretation of Article 72 in relation to nullification of an election. For convenience, I will first recite Article 72, relevant portions of which read:

72. (2) The office of Member of Parliament becomes vacant if the member—

(a) resigns by notice, in writing, to the Speaker; (b) becomes disqualified for election in accordance with Article 70; (c) acts contrary to a prescribed code of conduct; (d) resigns from the political party which sponsored the member for election to the National Assembly; (e) is expelled from the political party which sponsored the member for election to the National Assembly; (f) ceases to be a citizen; (g) having been elected to the National Assembly, as an independent candidate, joins a political party; (h) is disqualified as a result of a decision of the Constitutional Court; or (i) dies.

(4) A person who causes a vacancy in the National Assembly due to the reasons specified under clause (2) (a), (b), (c), (d), (g) and (h) shall not, during the term of that Parliament— (a) be eligible to contest an election; *(emphasis added)*

[121] I am of the firm view that the plain meaning of causing a vacancy as stated in Article 72 is that where a Member of Parliament causes a vacancy in circumstances in which he or she has been found to be at fault, he or she is prohibited during the term of that Parliament from contesting an election to fill the vacancy.

[122] The Applicants are of a different view and I must digress briefly at this point to address the source of their disagreement. This Court's decision in **Law Association of Zambia v Attorney General²** has been touted as the basis for contending that this Court has already held that Article 72, in its entirety, does not apply to a case of nullification following an election petition. It is the Applicants' contention that the 2nd Respondent wrongfully interpreted the Constitution and failed to appreciate the distinction we drew in **Law Association of Zambia v Attorney General²** between nullification and disqualification thereby concluding that there is a lacuna.

[123] In my opinion, the Applicants' contentions are misguided. My reasoning in saying so is two-fold. Firstly, whilst I agree that in the **Law Association of Zambia v Attorney General²** case, we came to

the conclusion that there is a lacuna in Article 72 (2) (h) as it does not provide for nullification of an election, I am of the firm view that the finding of a lacuna was made *per incuriam*.

[124] The distinction that we drew between ‘nullification’ and ‘disqualification’ in fact clarifies that Article 72 (2) (h) was enacted to provide for a disqualification made by this Court upon establishing a constitutional contravention. It has no connection to an election petition to nullify an election hence it is not lacking in that way. That is why the power in clause ‘h’ is reposed only in the Constitutional Court as guardian of the Constitution. I am fortified in so saying by the case of **Bizwayo Newton Nkunika v Lawrence Nyirenda and the Electoral Commission of Zambia**.³

[125] Still in support of the first point, I wish to revisit our determination of the first question raised in the case of **Law Association of Zambia v Attorney General**². Our consideration began in paragraph 81 of the Judgment wherein we found the question before us to be whether Article 72 (2) (h) of the Constitution is applicable to a Member of Parliament whose seat has been nullified by the High Court and who has appealed to this

Court in line with Article 73 (3) of the Constitution. Our answer was 'no' and rightly so.

[126] In Paragraph 81 we correctly delinked Article 72 (2) (h) of the Constitution from Article 73 (3) by pointing out that whilst Article 73 of the Constitution does provide for an election petition and appeal, Article 72 (2) (h) of the Constitution relates to a disqualification declared by this Court. We were clear in paragraph 83 that Article 72 (2) (h) of the Constitution provides for only one instance where a vacancy occurs in the National Assembly. Accordingly 'disqualification' and 'nullification' cannot both be found in Article 72 (2) (h) of the Constitution and nullification' is to be sought elsewhere in the Article.

[127] My second line of reasoning relates to what we subsequently said in paragraph 84 of the **Law Association of Zambia v Attorney General**² decision, which is that there is a lacuna in the entire Article 72 of the Constitution as there is no provision for nullification of an election, as the cause of a vacancy for purposes of Article 72 (4) of the Constitution.

[128] I am of the firm view that ‘the extension’ of the lacuna to the entire Article 72 (2) of the Constitution was either a typographical error or it was made *per incuriam*. I say so because Paragraph 84 beginning “...it is evident...” and ending “...it deserves...” ought to be read only in the light of paragraphs 81, 82 and 83. Paragraphs 82 and 83 read:

82. The two words “nullify” and “disqualify” cannot be used interchangeably as they mean different things. Black’s Law Dictionary defines nullify to mean “to make void: to render invalid”. It further defines disqualification to mean inter alia: “the act of making ineligible; the fact or condition of being ineligible”. It further defines it as the punishment that may be imposed after an official has been impeached and removed from office, precluding the official from holding another office or enjoying the benefit any benefits of having held office”. Therefore, the disqualification which is covered under Article 72 (2) (h) is distinct from the nullification of an election by the High Court following the determination of an election petition or subsequently by the Constitutional Court on appeal. Further, when Article 72 (2) (h) is read together with Article 70 (2) and Article 72 (4) the implications on disqualification are materially different.

83. In sum, Article 72 (2) (h) provides for one instance where a vacancy occurs in the national Assembly through a disqualification of a Member of Parliament by a decision of this Court on appeal pursuant to Article 73 (3) read with Article 128 (1) (d) of the Constitution.

[129] Paragraph 84 reads:

84. It is evident from the foregoing that while Article 72 (2) of the Constitution provides for instances when the office of Member of Parliament becomes vacant, it does not provide for a vacancy

triggered by the nullification of an election by the High Court where there is no appeal. It also does not provide for the occurrence of a vacancy in the National Assembly following a decision of this Court to uphold the nullification of an election by the High Court or by the reversal of a decision of the High Court not to nullify the election of a Member of Parliament as the case may be. The argument therefore that section 108 (4) addresses the lacuna is untenable in view of Articles 57, 73(3) and 128 (1) (d) of the Constitution. In our view the failure by the framers of the Constitution to provide for a vacancy occurring following the nullification of an election by the High Court where there is no appeal within the prescribed time as well as following a decision of this Court on appeal is a lacuna that requires addressing by the legislature to provide in clear terms for these two instances and must be addressed with the urgency that it deserves.*(emphasis added)*

[130] Paragraph 84 is in my opinion distorted by the omission of '(h)' after '72 (2)' in the opening sentence. As an inadvertent error or typo we ought to have been corrected it by invoking Order XV rule 3 of the Constitutional Court Rules S.I.No.37 of 2016.

[131] We did not do so, thus paragraph 84 must be taken at face value. More so as it has been endorsed by the Majority decision. I therefore must accept that Paragraph 84 is intentional. Nevertheless, I still find that the Applicants' argument is flawed'.

My misgiving about the Applicants' understanding of our decision in **Law Association of Zambia v Attorney General**² draws on the mechanics of adjudicating.

[132] It is trite that, a principle of law emanating from a decision of the court is the culmination of a process of reasoning; of considering and determining a recognised issue. In short, a conclusion of law or binding precedent is created by the clear identification of an issue and proper consideration of the relevant law.

[133] The parties in **Law Association of Zambia v Attorney General**² did not raise or argue any issue relating to Article 72(2) as a whole. Had that been the case, proper consideration would have entailed looking at each clause of the Article. This is so because Article 72 (2) is composed of nine different instances in which a vacancy may be caused in Parliament. Six of the instances trigger the ban in Article 72 (4).

[134] As only Article 72 (2) (h) was considered there is no basis upon which to draw a global conclusion that Article 72 (2) does not provide for an instance where a vacancy is connected to the nullification of an election. To say so would take our remarks in paragraph 84 of the **Law Association of Zambia v Attorney General**² out of the realm of *obiter dictum* (comment made by the

way) where they rightfully belong into that of *ratio decidendi* (reason for decision) where they have no place.

[135] I need look no further than **Black's Law Dictionary**, 8th Edition and the online **Oxford Languages Dictionary** for support. The latter defines *obiter dictum* as:

A judge's expression of opinion uttered in court or in a written judgment, but not essential to the decision and therefore not legally binding as a precedent

In contradistinction, it defines the *ratio decidendi* as:

The rule of law on which a judicial decision is based.

[136] The sum of my response to the claim that we found a lacuna relating to the nullification of an election in the **Law Association of Zambia v Attorney General**² case and therefore determined that a person who causes a vacancy in such circumstances is not subject to Article 72 (4) of the Constitution is that such a position is not supported by the Constitution, the law and a review of the said case. Attempts by the Applicants to claim that paragraphs 82 to 84 of the said Judgment pre-determined the outcome of this interpretation of Article 72 cannot hold water as there was no foundation laid in **Law Association of Zambia v Attorney General**² for such a determination to take place. The interpretation

in *casu* is therefore an opportunity to clarify this as opposed to giving it life.

[137] I say so comforted by the authorities from our sister court. The Supreme Court has acted to correct itself in the past. In **Hajra Import & Export Limited v Zambia Revenue Authority**⁴ at page J4 the Supreme Court said:

it is a well established principle that this court is bound by its decisions except where there are two conflicting decisions or where a previous decision was per incuriam. (emphasis added)

[138] The Supreme Court stated baldly in **Irwin v The People**⁵ that its ‘... earlier judgment was made *per incuriam*.’ In **Afritec Asset Management Company Limited and Another v The Gynae and Antenatal Clinic Limited and Another**⁶ the Supreme Court stated at page 22 that:

To this extent we misdirected ourselves in the Manal case when we held that such an application should come to an appellate court by way of an appeal. We accordingly reverse our decision in that case.

[139] I now return to my interpretation of Article 72 of the Constitution in relation to the nullification of an election. I wish to begin by establishing the intention behind the enactment of Article

72 of the Constitution. I am of the firm view that it was the intention of the framers of the Constitution to bar a person who has caused a by-election from taking part in the by-election that he or she has caused.

[140] I take judicial notice that this is not only the expressed intention of Parliament as shown by the plain language of Article 72 but also the expressed intention of the framers of the Constitution as shown in the Final Draft Report of the Technical Committee Drafting the Zambian Constitution (Final TCDZC). Reference to such reports is not unusual and is helpful to my cause.

[141] In the **The State v T Makwanyane and M Mchunu**⁷ the South African Constitutional Court said:

In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process. The United States Supreme Court pays attention to such matters, and its judgments frequently contain reviews of the legislative history of the provision in question, including references to debates, and statements made, at the time the provision was adopted. The German Constitutional Court also has regard to such evidence.

[142] The Final TCDZC shows the marked change in the People's attitude towards unnecessary by-elections. It followed the First

TCDZC of 2012 which recommended a proportional representation system. The First TCDZC therefore made no reference to the eventuality envisaged by Article 72 (4). The Report shows that the proportional representation system was unanimously approved by the people as a way to end by-elections. Relevant portions at page 74 read:

The Committee observes that the “open party list” PR system has several advantages over the first –past-the-post system currently in use. The advantages include the following:

(c) by-elections will be eliminated, thereby saving the country colossal sums of money.

(emphasis added)

[143] The Final TCDZC Report on the other hand recommended a Mixed-Member Representation system that combined First Past the Post constituency-based seats with proportional representation Closed Party List seats. At page 380, it provided in draft Article 131 (the precursor to Article 72) that both a Member of Parliament occupying a constituency-based seat and a political party that caused a vacancy in Parliament be barred from re-contesting the seat.

[144] Relevant portions of draft Article 131 read:

131(2) The office of Member of Parliament, holding a constituency-based seat becomes vacant if the member-

- (a) resigns by notice in writing to the Speaker;**
- (b) becomes disqualified for election in accordance with Article 129;**
- (c) acts contrary to a prescribed code of conduct;**
- (d) resigns from the political party which sponsored the member for election to the National Assembly;**
- (e) is expelled from the political party which sponsored the member for election to the National Assembly;**
- (f) ceases to be a citizen;**
- (g) having been elected to the National assembly, as an independent candidate, joins a political party;**
- (h) is disqualified as a result of a decision of the Constitutional Court; or**
- (i) dies**

(3) The office of a Member of Parliament selected from a party list becomes vacant if the member;

- (a) resigns by notice, in writing, to the Speaker;**
- (b) is expelled from the political party that has been allocated that seat;**
- (c) is disqualified under Article 129;**
- (d) acts contrary to a prescribed code of conduct;**
- (e) ceases to be a citizen;**
- (f) dies.**

(4) A person who causes a vacancy in the National Assembly due to the reasons specified under clause 2(a), (b), (c), (d), (g) and (h) shall not during the term of that Parliament –

- (a) be eligible to contest an election**
- (b) hold public office**

(5) A political party that causes a vacancy in the National Assembly by expelling the member of Parliament from the political party or allows an independent member of Parliament to join the political party shall not during the term of that Parliament, take part in a by-election.*(emphasis added)*

[145] The Constitution of Zambia (Amendment) Act No.2 of 2016 is drawn from the Final TCDZC Report. Although it did away with the Mixed Member Representation system and replaced it with the First

Past the Post system it clearly and unambiguously retained the barring of a Member of Parliament who causes a vacancy in Parliament within the provisions of Article 72 of the Constitution.

[146] I say so because whilst the Final TCDZC Report refers only to floor crossing as the reason for barring a Member of Parliament who causes a vacancy from contesting the vacated seat, the draft provision and the enacted Article 72 (2) of the Constitution include other instances, such as resigning, being unqualified and acting contrary to a prescribed code of conduct.

[147] I am of the firm view that such a comprehensive enactment would not have been necessary if the framers of the Constitution merely wanted to restrict themselves to vacancies caused by floor crossing.

[148] It is clear that what ties a particular instance in Article 72 (2) of the Constitution to Article 72 (4) of the Constitution is an impugned act or factor attributable to the Member of Parliament personally. Hence, a person who causes a vacancy whether it be by resigning (Article 72 (2) (a)), lacking the requisite qualifications (Article 72 (2) (b) , breaching a code of conduct (Article 72 (2) (c), changing citizenship (Article 72 (2) (d)), crossing the floor (Article

72 (2) (g)) and being disqualified by the Constitutional Court (Article 72 (2) (h)) is liable to be barred from re-contesting the vacated seat because of their intentional act or omission which has caused a vacancy.

[149] In the light of the 1st Respondent's 'genus' argument, I am persuaded that causing a vacancy by way of nullification of an election does belong to the 'ineligible category' provided for in Article 72 (2) of the Constitution read with Article 72 (4) of the Constitution and is therefore provided for. If it did not so belong, it would have been expressly excluded.

[150] It is apparent that 'nullification of an election' does not appear in Article 72 of the Constitution. In my considered view the term does not appear because it would be a misnomer. 'Nullification of an election' is the process presided over by the court, by which an election is voided. It may also be the outcome of the process. It is not the reason for the voiding of the election and therefore it is not the substantive cause of the ensuing vacancy.

[151] With that clarity it is evident that Article 72 (2) (b) and (c) of the Constitution has captured the actual acts of the Member of Parliament which are the cause of the nullification of an election. I

say so alive to the need to avoid determining any difficulty in Constitutional provisions through a restrictive, legalistic mode of interpretation that undermines the true purpose of the constitutional provisions in issue. That is not how constitutional provisions ought to be interpreted but in a broad and generous fashion.

[152] I am fortified in so saying by the Malawi Supreme Court's view in the case of **Mutharika and the Electoral Commission v Chilima and Chakwera**⁸ at page 109 that:

While the Court may observe inadequacies in the constitutional provisions on an aspect that of itself should not make the Court find a convenient meaning that covers or clothes the inadequacies.

[153] I say Article 72 (2) (b) and (c) of the Constitution captures the nullification of an election following a reading of the Article in the context of related Articles in the Constitution and the related provisions of the Electoral Process Act.

[154] It is helpful to begin with Article 73 of the Constitution. Article 73 provides for the filing and hearing of a petition relating to the election of a Member of Parliament. It is to be read with Article 48.

Article 48 provides that the electoral process for electing (among others) a Member of Parliament, shall be prescribed. That prescription is the Electoral Process Act No. 35 of 2016 (henceforth the 'EPA'). The EPA includes section 97 on the avoidance (nullification) of an election, a provision which was validated by this Court in the case of **Joseph Busenga v Attorney General**.⁹

[155] Section 97 of the EPA provides for the nullification of an election because of (a) the misconduct of the candidate or their agent ; (b) failure on the part of the Electoral Commission of Zambia (ECZ) to comply with the law; and (c) lack of appropriate qualifications on the part of a candidate.

[156] Specifically, an election may be nullified under either subsection (a) of section 97 (2) of the EPA due to the misconduct of the winning candidate or their agent; or under subsection (b) of section 97 (2) of the EPA due to the failure of the ECZ to conduct the election in compliance with the law; or under section 97 (2) (c) of the EPA because the candidate is not qualified to hold the office of Member of Parliament as specified in Article 70 of the Constitution.

[157] I hasten to say that the failure by ECZ does not trigger Article 72 (4) of the Constitution even though a vacancy is created. The reason is clear. In section 97 (2) (b) of the EPA the impugned conduct is not attributable to the Member of Parliament whose seat is to be vacated. In the case of **Sampa John v Brian Mundubile and the Electoral Commission of Zambia**¹⁰ we drew a distinction between a nullification under section 97 (2) (a) and that under section 97 (2) (b) which explains why the nullification under (b) does not trigger Article 72 (4) of the Constitution.

[158] This reinforces my view that it is not the nullification per se, either as a process or an end, which is the target of Article 72 (4) but a Member of Parliament's impugned conduct, whether it occurs before or after the election.

[159] Nullification under section 97 (2) (a) and (c) of the EPA is therefore pertinent. I will begin with the first, that is, nullification under section 97 (2) (a). It relates to the election candidate's conduct during the election process. I say so because of the provisions of Article 54 of the Constitution. Article 54 reads:

A candidate and a political party shall comply with a prescribed code of conduct. (*emphasis added*)

[160] Article 54 of the Constitution prohibits a Parliamentary candidate from engaging in conduct that goes against the principles in Article 45 of the Constitution. Article 54 is the source of the election offences tabulated in Part VIII of the EPA and the Electoral Code of Conduct set out in Part X of the EPA. That Article 54 sits in Part V of the Constitution entitled 'Representation of the People Electoral Systems and Process' is telling. It is clear that whilst the phrase 'a code of conduct' in Article 72 (2) (c) of the Constitution refers to any code of conduct that applies to the office of Member of Parliament including the code of conduct in the EPA.

[161] I find this to be a helpful way of understanding the provisions I have cited because to exclude the code regulating the electoral process from the ambit of Article 72 (2) (c) of the Constitution would mean a Member of Parliament could be punished for misconduct that occurs in Parliament but not for misconduct that enabled him or her to get into Parliament. I cannot accept that this is what the framers of the Constitution intended.

[162] I adopt the same reasoning in considering the import of Article 72 (2) (b). I am of the considered view that this clause relates to the

nullification of a Parliamentary election following a petition filed under section 97 (2) (c) of the EPA. As Article 72 (2) (b) relates to the qualifications listed in Article 70, section 97 (2) (c) is tied to Article 72 (2) (b).

[163] When the three Articles – 70, 72 (2) (b) and 73 are read together with the said section 97 (2) (c) of the EPA, what emerges is that nullification of an election on the basis of clause (b) of Article 72 (2) triggers Article 72 (4) and the person who caused the nullification because they failed to produce the appropriate qualifications is barred from contesting the resulting by-election.

[164] It is my conclusion that an election petition filed under Article 73 if successful, leads to the ‘nullification’ of the election of a Member of Parliament. The impugned conduct which the Court takes into consideration in nullifying the election is envisaged in Article 72 (2) (b) and (c), and proscribed in section 97 (2) (a) and (c) of the EPA.

[165] The links between the cited provisions being clear and unambiguous, I am of the firm view that there is provision in Article 72 to bar a Member of Parliament whose election has been nullified

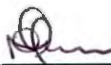
from contesting the related by-election. Otherwise, the question must be asked, if Article 72 (2) (b) or (c) in essence does not apply where a vacancy is created by a nullification then what does it apply to? If the answer is that it applies to nothing, then an absurdity arises because a person who has caused a vacancy is at liberty to vie for the same seat which he or she has vacated dishonourably, despite the existence of the mandatory provisions of Article 72.

[166] It is evident from the foregoing that the distinction drawn between disqualification and nullification in Article 72 (2) (h), in the **Law Association of Zambia v Attorney General**² Judgment, was not intended to undermine Article 72 (4) but rather to bring clarity as to why nullification is found elsewhere in Article 72.

[167] It is therefore my conclusion that the meaning of causing a vacancy in the National Assembly as stated by Article 72 is that it bars a person who has caused the vacancy in specified circumstances, from contesting an election held to fill the vacancy. The specified grounds include a vacancy that arises after the nullification of a Parliamentary seat as provided for in Article 72 (2) (b) and (c).

[168] Further, I find the Applicants condemnation of the ECZ misplaced. This is so not only because of the foregoing interpretation but also because the ECZ is bound by Article 1 of the Constitution to apply the Constitution as it understands it until and unless the Court interprets otherwise. I am of the firm view that the ECZ would be acting reasonably, legally and constitutionally to bar a person who caused the nullification of an election on the ground that they have caused a vacancy for the purposes of Article 72 (4) of the Constitution.

[169] My final word to the parties is that an interpretation which concludes that a person who caused a vacancy, following an election petition in which they are found to be in the wrong, does not trigger the application of clause (4) neither protects the Constitution nor fulfils the will of the framers of the Constitution, who are the People of Zambia. Rather, it renders Article 72 (2) (b) and (c) redundant and undermines the ECZ's ability to protect the integrity of the electoral process as it is mandated to do.



M. M. Munalula (JSD)

Deputy President Constitutional Court